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Overview

The line between transatlantic cooperation and disputes has been painfully fine over many decades and many respective administrations. Institutionalisation of trade has been a complex theme of transatlantic engagement as a means to deepen cooperation. The EU proposed an [EU-US Joint Agenda for Global Change](#) to the incoming Biden administration very early on in the new relationship, which would include a Transatlantic Trade and Technology Council.² It would appear to be proposing a 'loose' institutionalisation of key global challenges currently not well covered or dealt with by, for example, the WTO. It seems like an interesting forum to generate transatlantic convergence.³ Yet is it realistic to expect any transatlantic convergence on trade given the history of transatlantic relations? It goes without saying that relations between the EU and US reached rock-bottom, arguably the worst in six decades, with the Trump administration, where the [US briefly refused to diplomatically recognise the EU](#) - behaviour that is now being copied by the Brexit Britain 'playbook'. The new Biden administration has many Obama administration staff who are said to be 'battle-scarred' from their involvement in the failed EU-US Transatlantic Trade and Investment Partnership (TTIP) negotiations. A re-examination of the paused Transatlantic Trade and Investment Partnership (TTIP) negotiations appears very unlikely in the future of the transatlantic trade cooperation.

The US Trump administration reset transatlantic cooperation with the EU in 2018 and notably made an EU-US Joint Statement in 2018 after a Trump-Juncker summit was ultimately agreed. It was not ambitious but was ostensibly a preferable development to trade wars and tariffs to work together towards zero tariffs, zero non-tariff barriers, zero subsidies on non-auto industrial goods; energy; and unfair global practices, for example through WTO reform. It took effect through an Executive Working Group and an EU-US Financial Regulatory Forum 2019 but its institutionalised components quickly tapered off and instead the EU has been battling significant tariff wars with the US, for example on steel and aluminium, and through a US investigation on motor vehicles and automotive parts. Its modest ambitions were never realised and much has remained on hold during the COVID-19 crisis and since the US Presidential election, and some say those ambitions are worsening.

Arguably, one development of interest with respect to institutionalisation developments was on conformity assessment in 2019, as a form of regulatory cooperation, which is considered here next.

Transatlantic regulatory cooperation: a history doomed to failure?

Transatlantic regulatory cooperation has traditionally been a 'swift' rather than a 'deep' affair, unlike its disputes which often appear to run longer than its agreements. Arising from its last major framework, the New Transatlantic Agenda (NTA) of 1995, by 2003, nine formal binding and non-binding regulatory

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² Joint communication to the European Parliament, the European Council and the Council: *A new EU-US agenda for global change* JOIN (2021)22 final
<https://ec.europa.eu/info/sites/info/files/joint-communication-eu-us-agenda_en.pdf>

³ See Elaine Fahey, *Framing Convergence in the Global Legal Order: the EU and the World* (Hart, 2020).

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cooperation agreements had been entered into between the EU and US in areas as diverse as competition, privacy, customs and veterinary standards. Nonetheless, at whatever stage of its development, transatlantic cooperation has posed major challenges for regulatory independence, transparency and administrative law requirements, confidentiality, multi-level governance and regulatory sovereignty. The Transatlantic Trade and Investment Partnership (TTIP) negotiations purported to develop a multilevel 'postnational marketplace' which would deepen and prospectively institutionalise EU-US relations in a range of fields - such as pharmaceuticals, chemicals, public procurement or motor vehicles - and also through a Regulatory Cooperation Council with rule-making capacity.⁴ The TTIP negotiations involved developments far beyond the technical scope of the last EU-US Mutual Recognition Agreement from 1997. Its Regulatory Cooperation Chapter generated much concern as to the legitimacy of its operation, its effects upon EU law and the executive nature of its actions.

Post-TTIP regulatory cooperation: TTIP-lite

On 18 January 2019, the European Commission published a [draft negotiating mandate](#) for its trade talks with the US, following on from the EU-US [Joint Statement](#) to increase bilateral cooperation. The mandates covered two areas where the likelihood of an agreement was easier in less disputed terrains – eliminating tariffs on industrial goods and increasing conformity assessment (CA) cooperation, where one of the main negotiating objectives of both sides was to remove non-tariff barriers (NTBs) that are estimated to have an even more profound effect on trade than tariffs, suggested by the USTR to be one the main trade barriers for the US to the EU market in its [2018 Foreign Trade Barriers](#) report. The cooperation was not about cooperation on the content of regulatory disciplines and would only relate to the recognition of testing, inspection or certification from US or EU authorities. It was in short TTIP lite (or ultra-lite), a far less ambitious mechanism than had been initially intended under the TTIP ('Regulatory cooperation chapter').⁵ The question is what depth could lie between the extremes of TTIP and CA?

Lobster dinners, light lunches

One of the next stages worthy of remark in transatlantic trade cooperation came in 2020. US Trade Representative Robert Lighthizer and former European Union Trade Commissioner Phil Hogan agreed a package of tariff reductions for market access worth hundreds of millions of dollars in US and EU exports.⁶ These tariff reductions were the first US-EU negotiated reductions in duties in more than two decades. Under the agreement, the EU eliminated tariffs on imports of live and frozen lobster products from the US. The value of US exports of these products to the EU was over 111 million USD in 2017. The EU would eliminate these tariffs on a Most Favoured Nation (MFN) basis, applying retroactively from 1 August 2020. The EU tariffs would be eliminated for a period of five years. The European Commission proposed a [regulation](#) on the elimination of customs duties on lobster imports in September 2020. However, in reality, this was a

⁴ Marija Bartl and Elaine Fahey 'A Postnational Marketplace: Negotiating the Transatlantic Trade and Investment Partnership (TTIP)' in E. Fahey & D. Curtin (Eds.), *A Transatlantic Community of Law: Legal Perspectives on the Relationship between the EU and US legal orders* (Cambridge University Press, 2014).

⁵ Lulianna Romanchyshyna, ' [The Post-TTIP Transatlantic Cooperation on Trade: Stepping up Conformity Assessment](#)' *EJIL Talk*, 25 February 2019.

⁶ European Commission, Trade: Joint Statement of the USA and the EU, press release of 21 August 2020.

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meagre light-lunch rather than a lobster feast, where the US lobster fishers had been adversely affected by the implementation of the EU-Canada Economic and Trade Agreement (CETA), causing much concern in the US lobster industry. The 'small fry' nature of the agreement was palpable and appeared to be arguably grossly overhyped by both the EU and US, and show an interesting reminder of the impact of the EU on North America generally.

The future of the WTO and the EU-US relationship: institutionalisation outside? China inside?

It is an understatement to say that a significant number of transatlantic disputes have taken place at the WTO over the years and have been ongoing for some time, especially the seemingly never-ending Boeing/Airbus dispute. In 2019, the US imposed countermeasures worth nearly 7.5 billion USD on certain EU goods following a favourable ruling by the WTO arbitrator in a long-standing dispute over measures affecting trade in large civil aircraft (Airbus). In 2020 US tariffs on Airbus were increased from 10 to 15%. A similar case brought by the EU against the US over subsidies paid to Boeing is underway and a favourable ruling for the EU was delivered in October 2020, authorising the EU to take countermeasures covering 4 billion USD worth of imports. However, in March 2021, the US temporarily suspended all retaliatory tariffs on direct exports from the UK to the US resulting from the Airbus dispute for four months, in an effort to reach a negotiated solution to the 16-year long dispute following on from the UK's unilateral decision to suspend tariffs against the US from 1 January.⁷ The EU has disputed that the UK had the right to act unilaterally in a trade dispute between the EU and US when it left the EU. However, shortly thereafter the EU and US agreed to suspend all retaliatory tariffs on EU and US exports imposed in the Airbus and Boeing disputes for a four-month period.

With the collapse of the WTO dispute settlement system it remains to be seen what the forum for future dispute settlement will be outside of trade tariff wars. The US, long before the Trump administration, had voiced significant concerns as to the development of WTO dispute settlement. The EU along with several other major developed economies has been involved in interim workarounds. The place of the WTO at the epicentre of world trade remains very much in doubt even under new leadership without robust functioning dispute settlement. The extent to which the EU and US will be able to commit to robust institutionalisation of global trade will be critical and it seems likely that evolution of the WTO will be high on the agenda. However, the place of China and its market State status will be of much concern. China has sought to a very considerable extent to embed itself within WTO law and practice and to engage in litigation and institutionalise the WTO within its trade system and procedures. The future of EU-US engagement with China appears central to the global economic order's equilibrium. Yet US dismay as to the [EU-China Comprehensive Agreement on Investment of December 2020](#) has quickly ensued, as has significant critique from within the EU as to the embrace of China in this way. While EU-China-US cooperation arguably remains critical to the future of the international economic order, the institutionalised dialogues between the EU, US and China needed on a technical level in order to develop shared objectives and guidance may remain elusive for some time. Also, whether this can lead to the evolution of significant WTO reform remains to be seen.

Enforcement and better, greener and fairer transatlantic trade?

⁷ Office of the US Trade Representative, Joint US-UK Statement on Suspension of Large Civilian Aircraft Tariffs, press release of 3 April 2021.

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The next USTR appears to have a significant focus upon fair trade and the emphasis of the new demonstration upon green trade similar to the EU, as a likely useful set of cooperative planks. However, the new USTR will encounter a somewhat different EU, one with a new emphasis upon strategic autonomy - however still undefined - albeit now with a Trade Enforcement officer and enforcement regulation, and a systematised approach for dealing with bruising global encounters not like before. Many within the EU are staggered by its EU-China Investment Agreement, with problematic challenges for human rights. The EU is testing the limits of its trade agreements with developed economies such as Korea, on thorny issues of labour. The European Commission has sent letters of formal notice to the United Kingdom for breach of its obligations under the Protocol on Ireland and Northern Ireland under the Withdrawal Agreement. China will remain a common transatlantic concern. The challenge for better, greener and fairer trade and its institutionalisation may be significantly more complex beyond the transatlantic relationship than ever but this is arguably a constant feature of the era of global governance currently taking effect.

The institutions within? The European Parliament and the future architecture transatlantic trade

A lot of discussion on transatlantic institutionalisation omits the institutions 'within'. A transatlantic legislators dialogue has been ongoing for several years, between the European Parliament (EP) and the US Congress. It should not be forgotten that the EP was excluded significantly from the last EU-US trade cooperation efforts. On 14 March 2019, the EP rejected a draft resolution recommending the opening of EU-US trade talks (on both industrial goods and conformity assessment following a tight vote. An EP resolution on talks with Washington was defeated by 223 votes against 198, with 37 abstentions. The resolution had called on EU countries not to endorse negotiating mandates that authorise the European Commission to start talks with Washington. Opponents of negotiations won key amendments, but lost the final vote. The complicated position of the EP on these trade talks makes for unhappy reading for those used to the narrative of the rising power of the EP. [Significant litigation is also being taken by the EP on the thorny issue of EU-US visa reciprocity for certain Eastern Europe Member States with respect to the US](#). Its involvement in any future EU-US trade agreement will likely become intricate.⁸ Yet, as the CETA saga demonstrates, the EP is not a decisive actor in EU international trade and increasingly Member States are seeing the rise of the ratification veto emerging in new ways through their parliaments - under mixed agreements at least. The future of deeper cooperation with the US will have a special salience for the EP, which experienced considerable exclusion during the Trump administration relationship. The deepening institutionalisation of EU trade is a new reality. Yet it is imbalanced in terms of its multi-level identity - across the Member States, national parliaments continue to engage badly with international negotiations and litigate mostly unsuccessfully to block trade accords in areas. Transparency and better participation of civil society will be key to future deepening of transatlantic relations. The role of the EP in this will nonetheless become quite pivotal as it likely seeks to extend its voice and possible powers of review if it can exercise meaningful influence outside of the EP in a courtroom or in its own territory, committees and sphere of influence.

In this Special Edition

The future of EU-US economic relations is considered in this Special Edition from several perspectives (institutions, regulatory standards, climate change and taxation). Kai Purnhagen of the University of

⁸ European Parliament, EU-US visa reciprocity: the Commission must defend the rights of all EU citizens, press release of 22 October 2020.

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Bayreuth sketches three scenarios which may follow from a proposed EU-US Trade and Technology Council: (1) A 'Brussels effect', (2) a 'Washington effect', or (3) an approach based on a case-by-case mediated deliberative intergovernmentalism. Which of these forms will materialise he argues will largely depend on the chosen institutional framework for such a transatlantic partnership. He argues for a realisation of the proposed EU-US Trade and Technology Council, based on a transatlantic economic constitution and the establishment of a powerful forum for negotiations, which is robust, strong and meaningful. Eva Van der Zee, University of Hamburg considers the place of the EU's Green Deal and climate change in the future of EU-US trade relations. She shows how transatlantic cooperation on a 'Carbon Border' tax is already proving to be fractious. While the Biden Administration is committed to imposing such a tax, US interest in it may be tempered if they do not manage to enact strong domestic legislation on climate change. Given the current composition of the Senate, such legislation may be difficult to achieve. It, therefore, remains to be seen whether the Biden Administration will succeed in strengthening EU-China-US relations, as well as securing the needed bipartisan support for such taxation measures. Maria Kendrick, City Law School argues that whilst it may appear that the digitalisation imperative is moving global tax policy in one direction, the reality is likely to be made up of differentiation and minimum standards set in limited areas at EU level, on limited aspects of tax policies. The unilateral adoption of Digital Services Taxes 'DSTs' has shown that whilst a DST is possible, at the international and EU level it is at best a 'Plan B' and difficult to achieve - not likely to aggravate transatlantic relations in the foreseeable future.

We hope that the reader enjoys this selection of topics on surely the most cutting-edge areas of the future of the international economic order.